Filed 9/30/15 P. v. Muwwakkil CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SULAIMAN SHAHEE MUWWAKKIL, Defendant and Appellant.	A142657 (Contra Costa County Super. Ct. No. 5-981508-5)

Sulaiman Muwwakkil appeals from the trial court's extension of his state hospital commitment pursuant to Penal Code section 1026.5, subdivision (b). The trial court found that Muwwakkil is dangerous by reason of a mental disorder and has serious difficulty controlling his dangerous behavior. Muwwakkil contends these findings were not supported by substantial evidence. We will affirm.

I. FACTS AND PROCEDURAL HISTORY

Muwwakkil was charged with a second degree burglary that allegedly occurred in August 1998. (Pen. Code, §§ 459, 460, subd. (b).)[1] In April 1999, he was committed to the California Department of Mental Health. He was later found not guilty by reason of insanity and admitted to Napa State Hospital on May 13, 2009. (§ 1026.) His original commitment term was to expire on August 25, 2013.

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

On June 12, 2013, the District Attorney of Contra Costa County filed a petition to extend Muwwakkil's commitment pursuant to section 1026.5, subdivision (b). The court heard the matter on June 25, 2014.

A. Dr. Saini's Testimony

Dr. Amrit Saini, a psychiatrist at Napa State Hospital, provided expert testimony in the diagnosis of mental illness. He testified that Muwwakkil had been under his care for the last four years and he had met with Muwwakkil for approximately an hour once a month.

Dr. Saini diagnosed Muwwakkil with a severe mental disorder, specifically "schizophrenia, continuous type," as well as "cocaine use disorder in full remission in controlled environment." His current symptoms include auditory hallucinations, delusions of grandiosity, and paranoid delusions, and his "belief system . . . is not based on reality." His thought process is "intermittently disorganized," he does not always behave "according to the social norms," and he is unable to maintain proper hygiene and grooming, strictly follow directions of the staff and the treatment team, or "properly follow social interaction with his peers and staff." His symptoms continue despite "gold standard" medication.

Dr. Saini further opined that Muwwakkil's schizophrenia is not in remission. Remission is important because it allows a patient to better understand the historical factors that "contributed to his commitment to the hospital, how his treatment is going to be helpful to him in his future life, [and] how that is going to translate into his safety in the hospital and in the community."

In Dr. Saini's view, Muwwakkil is ambivalent about taking his medications, although he has taken them despite suffering side effects. The voices Muwwakkil hears are "derogatory" but "do not command him to do anything wrong," and he has not shown aggression "based upon his voices" for at least a year.

B. Dr. Bercovitch's Testimony

Dr. Eytan Bercovitch, a psychologist at Napa State Hospital, provided expert witness testimony concerning the treatment of mentally ill patients and the risk assessment of the mentally ill. Dr. Bercovitch has treated Muwwakkil since 2009 and is Muwwakkil's assigned staff psychologist. He usually sees Muwwakkil four days a week, either individually or in a group session.

1. Dangerousness Due to Mental Disorder

Like Dr. Saini, Dr. Bercovitch opined that Muwwakkil suffers a severe mental illness or disorder—schizophrenia, continuous type. Dr. Bercovitch also testified as to Muwwakkil's dangerousness as a result of the disorder.

Dr. Bercovitch testified that he had performed a risk assessment on Muwwakkil, using the variables identified in the instrument known as "HCR-20." Dr. Bercovitch had not put the assessment in writing, but his familiarity with the HCR-20 and its "20 variables, [including] 10 historical, 5 current, [and] 5 future risk management variables" enabled him to perform the assessment "in [his] mind," the "same way as if [he] had written it up." While the absence of a written assessment is "not good for purposes of documentation," Dr. Bercovitch stated that the assessment was still considered accurate.

In determining whether Muwwakkil poses a substantial danger of physical harm to others, Dr. Bercovitch also reviewed Muwwakkil's historical record (including alienists' reports, police reports, records from previous admissions, previous psychological assessments, various team reports, and letters from previous doctors) to identify factors that contribute to dangerousness. A patient is at higher risk if he has the same behaviors or symptoms that he had when he acted dangerously in the past.

Dr. Bercovitch explained that, when Muwwakkil committed the burglary offense that resulted in his state hospital commitment, Muwwakkil had been suffering continuous symptoms of schizophrenia (including disorganized thought and communication, auditory hallucinations, delusions, and lack of insight), was under extreme stress related

to being homeless, and his symptoms were aggravated by his use of crack cocaine. As a result, he made the poor choice "to break in" to obtain money for drugs.

Dr. Bercovitch testified that Muwwakkil currently has "partial insight, limited insight" regarding his mental illness, "cycling between very poor insight and moderately impaired insight." Lack of insight is a risk factor, because the patient is less likely to seek help and more likely to act on his symptoms if he is unaware of them. Muwwakkil is also at risk, Dr. Bercovitch opined, because he suffers active symptoms of a major mental illness even when taking medication. And while Napa State Hospital requires patients to have a Wellness and Recovery Action Plan as a condition for discharge so the patient can show an ability to identify and manage his symptoms, Muwwakkil's plan is only in the early stages of development.

Dr. Bercovitch also considered Muwwakkil's previous participation in the Conditional Release Program, or CONREP, which is a "kind of mental health probation system" by which a patient can be released from a forensic commitment before the end of the term. The program provides the patient with housing, treatment, and medication, but offers a less structured environment than Napa State Hospital. Muwwakkil had participated in CONREP four times since 1998, and each time he returned to the hospital: twice he asked to be readmitted; once in 2009 he was involuntarily readmitted after he assaulted a woman (by chasing her while he was angry) in their room-and-board home; and most recently he was readmitted after less than a week because he was showing significant impairment from schizophrenia, he "wasn't able to follow the rules," there was concern he would not take his medication, and it would be unsafe if he were not returned to an institution that could provide a higher level of support.

Dr. Bercovitch acknowledged that Muwwakkil's committing the offense of burglary did not involve violence and Muwwakkil was not combative with police when he was arrested. While Muwwakkil hears voices, he has been merely "inappropriate"—that is, committing minor rule violations or annoying someone—"but not, I would say, physically dangerous."

Dr. Bercovitch nevertheless opined that, although Muwwakkil has not engaged in assaultive conduct while in the hospital, he still poses a moderate to high risk of physical harm to others outside of a structured environment, in light of his overall history, poor impulse control, and clinical symptoms of schizophrenia.

2. Difficulty Controlling Behavior

Dr. Bercovitch also addressed whether Muwwakkil has "serious difficulty in controlling his behavior." When asked this question, Dr. Bercovitch said yes, due to Muwwakkil's "impulsivity." Dr. Bercovitch explained: "For instance, if he doesn't feel like doing something, he won't do it. If he feels like doing something, he will do it. He acts impulsively. And that means there is not a lot of control because he's not thinking of the long[-]term consequences of what he's doing. [¶] If he decides, for example, not to go to groups for a few days, he doesn't think what effect will that have on my treatment? [¶] If he is speaking to someone and begins to speak in a way that is disorganized or delusional, he won't be aware or insightful that he's doing so. He'll just start speaking that way." The impulsivity, related to his schizophrenia, is "one factor among a number of factors" that would be considered in evaluating substantial danger to others.

C. Trial Court's Ruling

The court found beyond a reasonable doubt that, if released, Muwwakkil currently poses a substantial danger of physical harm to others as a result of his mental disorder. The court explained: "[I]f released either to CONREP or the community, I don't think there's much question that he would relapse, as he has multiple times, his symptoms would increase, and that leads to behavior that does, in my view, pose a substantial risk of physical harm or a substantial danger of physical harm to the community or the CONREP representatives." Although no one was harmed in the burglary, a burglary still poses a substantial danger of harm, and chasing a woman in the halfway house indicated a danger as well. In addition, the court found that Muwwakkil "would have serious difficulty controlling his dangerous behavior if released to the community." The court extended Muwwakkil's commitment for two years.

This appeal followed.

II. DISCUSSION

A person found not guilty by reason of insanity may be initially confined in a state hospital no longer than the maximum term of imprisonment that could have been imposed for the offense of which he was convicted. (§ 1026.5, subd. (a)(1).) However, subdivision (b) of section 1026.5 provides for extended two-year commitments beyond the original maximum term if the prosecution proves, beyond a reasonable doubt, that the inmate, "by reason of a mental disease, defect, or disorder represents *a substantial danger of physical harm to others*." (§ 1026.5, subd. (b)(1), (b)(8), italics added.) Courts have concluded that the commitment cannot be extended unless it is proven that the inmate has "*serious difficulty in controlling dangerous behavior*." (*People v. Galindo* (2006) 142 Cal.App.4th 531, 533, 537 (*Galindo*), italics added; see *In re Howard N.* (2005) 35 Cal.4th 117, 132 [interpreting Welf. & Inst. Code, § 1801.5 to require such a finding].)[2]

We review for substantial evidence. (*People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1159, 1165; *People v. Bowers* (2006) 145 Cal.App.4th 870, 878-879 [a single psychiatric opinion may constitute substantial evidence to support an extension of a commitment under § 1026.5].) We must consider all the evidence in the light most favorable to the People, drawing all inferences the trier of fact could reasonably have made to support the finding. (*In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1503 (*Anthony C.*).)

A. Dangerous by Reason of a Mental Disorder

Substantial evidence supported the finding that Muwwakkil is "dangerous by reason of a mental disorder." (§ 1026.5, subd. (b)(1).) Drs. Saini and Bercovitch both

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[2] The parties' analysis is that there must be both the statutory dangerousness finding (that by reason of a mental disorder the inmate represents a substantial danger of physical harm to others) and a separate additional finding regarding lack of control (that the inmate has serious difficulty controlling dangerous behavior); a more accurate analysis may be that the statutory finding of dangerousness requires a finding of lack of control. (See *Galindo*, *supra*, 142 Cal.App.4th at p. 537; *In re Howard N.*, *supra*, 35 Cal.5th at p. 132.) Under either approach, we would reach the same result.

testified that Muwwakkil currently suffers from a mental disorder (schizophrenia, continuous type) that is not in remission despite the "gold standard" of available drugs. His symptoms include auditory hallucinations, delusions of grandiosity, and paranoid delusions, and he "has a belief system which is not based on reality." He also lacks sufficient insight into his illness. These are essentially the same symptoms Muwwakkil exhibited when he perpetrated his committing offense of burglary. Furthermore, on the two most recent occasions he was on CONREP, he was involuntarily returned to the hospital: once after he assaulted (chased) a female housemate, and later when he showed such impairment from his schizophrenia that he was unable to follow the rules and it was "unsafe" not to return him to a higher-level facility. Because his illness is not in remission and he has neither insight into his illness nor a plan for addressing his symptomology, it could reasonably be inferred that Muwwakkil would be at high risk in an unstructured environment for acting on his symptoms and making the type of poor decisions that caused him to be committed to the hospital in the first place, resulting in a danger to the community.

Muwwakkil nonetheless argues that Dr. Bercovitch's evaluation of his dangerousness is insufficient because Dr. Bercovitch did not conduct a *written* risk assessment and because his committing the offense of burglary and chasing a woman during CONREP did not involve actual *violence*. Neither argument has merit.

1. Risk Assessment Not in Writing

Muwwakkil asserts that an expert opinion does not constitute substantial evidence unless it is supported by adequate facts and reasoning. (Citing *People* v. *Bassett* (1968) 69 Cal.2d 122, 141-144 [expert witness testimony did not constitute substantial evidence where the experts, who had never examined the defendant, merely identified the defendant's mental capacity and agreed with the prosecutor's proposition without any reasoning or explanation].) He argues that Dr. Bercovitch performed the HCR-20 assessment in his "mind," and did not testify as to all the relevant factors and how he

assessed them, so Dr. Bercovitch's conclusion cannot be evaluated and does not constitute substantial evidence. Muwwakkil's argument is meritless.

In the first place, the fact that the assessment was not reduced to writing does not mean it cannot support the conclusion that Muwwakkil is dangerous by reason of his schizophrenia. Dr. Bercovitch testified that the lack of a writing does not undermine the efficacy of the assessment, and there was no expert witness testimony—or any other evidence—to the contrary.

Moreover, Dr. Bercovitch *did* provide his reasons and factual support for the conclusion that Muwwakkil is dangerous, as set forth *ante*. Among other things, Dr. Bercovitch identified the documents that he had reviewed in assessing Muwwakkil, his personal observations of Muwwakkil as his assigned psychologist over the years, and the risks that Muwwakkil exhibited—including the same symptoms of schizophrenia and inadequate insight that had previously contributed to his burglary offense. Dr. Bercovitch explained that, despite a lack of physical violence to date, Muwwakkil poses a "moderate to high" risk of physical danger or harm to others due to his mental condition, in light of his overall history of acting out dangerously in the community, his current clinical symptoms, and his lack of preparedness for the stresses of the community.

2. Violence

Muwwakkil contends Dr. Bercovitch was merely speculating that he presented a danger to others, since Muwwakkil's offense of burglary and his chasing of the female housemate while on CONREP were not violent. His argument is unavailing.

As a threshold matter, we note that whether an inmate poses a substantial danger of physical harm to others is a matter that necessarily requires a prediction, and expert witness opinion in this regard may well be the only available evidence. (*In re Qawi* (2004) 32 Cal.4th 1, 24; *People v. Ward* (1999) 71 Cal.App.4th 368, 374.)

Furthermore, the evidence in this case was sufficient. While Muwwakkil's burglary did not involve violence and he did not commit an actual battery on the female housemate, the court could reasonably conclude his actions indicated that he posed a

substantial danger to others. A burglary presents a risk of danger, since someone may be in the residence or commercial establishment at the time. Chasing a female—while angry—also suggests a risk of danger: danger to the woman and others as she tries to escape, and danger if he catches her and brings to fruition whatever threat of harm that prompted her to run. As the trial court noted, "I don't think we have to wait until he catches her and sees what damage is done before one can infer that's dangerous conduct."

Muwwakkil fails to establish error.

B. Serious Difficulty Controlling Dangerous Behavior

Muwwakkil next contends there was insufficient evidence to support the finding that he "has serious difficulty in controlling dangerous behavior." (*Galindo*, *supra*, 142 Cal.App.4th at p. 537.) Again, we must disagree.

Dr. Bercovitch testified that Muwwakkil currently has serious difficulty in controlling his behavior (including his dangerous behavior) because he acts impulsively. "[I]f he doesn't feel like doing something, he won't do it. If he feels like doing something, he will do it. . . . And that means there is not a lot of control because he's not thinking of the long[-]term consequences of what he's doing." Furthermore, in his most recent stint on CONREP, Muwwakkil was returned to the hospital within a week because his symptoms of schizophrenia were so severe that "he *wasn't able to follow the rules*" and had to be returned to the hospital for *safety* reasons. (Italics added.) In addition, Dr. Saini testified that one of Muwwakkil's symptoms of schizophrenia was that he was "*not able* to follow strictly the directions of the staff and the treating team." (Italics added.) From this evidence, it is reasonable to infer that Muwwakkil has serious difficulty in controlling his behavior, including his physically dangerous behavior, at least outside the state hospital environment.

Muwwakkil nevertheless contends that "impulsivity" is not the same as difficulty controlling behavior. He maintains, for example: "A person who buys junk food on display at the checkout counter at the market acts impulsively, but could choose not to

buy the junk food if he or she really wanted to do. The impulsive act does not necessarily prove there was no ability to refrain from the act."

The point, however, is that Muwwakkil does *whatever he feels like doing—even if* it is contrary to societal rules or welfare. In other words, while he may be able to control his behavior in the sense that he does what he wants to do, he has serious difficulty controlling his behavior so that he acts in ways that maintain societal safety even if he does not "feel like" acting that way. Further, he acts without regard to the consequences. That is substantial evidence of a serious difficulty in controlling physically dangerous behavior.

Muwwakkil's reliance on *Galindo, supra,* 142 Cal.App.4th 531, is misplaced. In *Galindo*, there was *no* finding—and *no* opinion by any expert witness—that the defendant had serious difficulty controlling dangerous behavior. Although the Attorney General argued that the error was harmless, the court rejected the argument because there was little if any evidence that the defendant encountered serious difficulty when he tried to control his behavior or that his difficulty was caused by his mental condition. (*Id*. at p. 539.) While there was "abundant evidence that defendant's behavior was dangerous and that he did not, in fact, control it," the "fact [that the defendant] *did not* control his behavior does not prove that he *was unable to do so,* thus making him 'dangerous beyond [his] control.' [Citation.]" (*Ibid*.)

Galindo is inapposite. In the first place, *Galindo* was decided in a different procedural context: the court did not hold that the evidence in that case could not constitute substantial evidence of a serious difficulty controlling dangerous behavior; it held merely that the evidence was insufficient to prove that the absence of the required finding was harmless beyond a reasonable doubt. (*Galindo, supra,* 142 Cal.App.4th at p. 539.) In any event, *Galindo* is distinguishable on its facts: here, unlike *Galindo*, there *was* a finding of difficulty controlling dangerous behavior, there *was* an expert opinion in this regard, there *was* testimony that the subject had difficulty controlling his behavior in light of his impulsivity, and there *was* testimony that this difficulty was related to his mental condition.

Muwwakkil also relies on *Anthony C., supra*, 138 Cal.App.4th 1493. There, a psychologist had not prepared a formal risk assessment and did not testify to any risk assessment he had performed in his mind. (*Id*. at p. 1506.) He was unable to recall many of the relevant risk factors. (*Id*. at p. 1507.) He testified that the defendant was "at least medium risk or higher" based primarily on the defendant's history of offending and current level of functioning, but he was "not sure exactly how high a risk" the defendant posed to the community if released. (*Id*. at pp. 1506-1507.) He did not testify that the defendant's mental abnormality caused him serious difficulty controlling his behavior, but to the contrary, opined that the defendant's impulsivity could possibly be controlled by medication that the defendant voluntarily took. (*Id*. at p. 1507.) Although the psychologist relied on the defendant's prior offenses, those offenses were crimes of opportunity rather than compulsion. (*Id*. at p. 1508.) Furthermore, there was evidence that the defendant was not a "behavior problem" and that he understood he had a mental illness. (*Ibid*.) The court concluded there was insufficient evidence of a serious difficulty controlling dangerous behavior, noting that the psychologist's opinion that the defendant posed a "moderate" risk of reoffense based on a limited number of risk factors failed to show he has "serious" difficulty controlling his behavior. (*Id*. at p. 1507.)

Anthony C. is distinguishable. While the psychologist in *Anthony C.* had not prepared any risk assessment, Dr. Bercovitch performed the assessment mentally. While the psychologist in *Anthony C.* did not testify that the defendant's mental abnormality caused his difficulty in controlling his behavior and opined that his impulsivity might be controlled by medication, Dr. Bercovitch testified that Muwwakkil's schizophrenia-related impulsivity did cause his difficulty in controlling his behavior and was not tempered by medication. While the past offenses of the defendant in *Anthony C.* were crimes of opportunity and there was no evidence of behavioral problems since his commitment, Muwwakkil's burglary offense was a crime of compulsion and he did have significant problems on CONREP. While the defendant in *Anthony C.* had insight into his mental illness, Muwwakkil's insight was limited. Moreover, Dr. Bercovitch did not merely say that Muwwakkil posed a moderate risk of reoffense; he testified that

Muwwakkil presented a moderate to high risk of physical harm to others and agreed that he had "*serious* difficulty in controlling his behavior." (Italics added.)

Muwwakkil fails to establish error.

III. DISPOSITION

The order is affirmed.

NEEDHAM, J.

We concur.

SIMONS, ACTING P. J.

BRUINIERS, J.

(A142657)